Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1137

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services,

Appellant,

- against -

RONALD MILNE, DOUGLAS STREETER, ROBERT C. LEE, and JOE NATHAN BEVERLY, WILLIE BEVERLY, ODELL BEVERLY, and JOHN BEVERLY, by their mother and next friend, ROBERTA BEVERLY, individually and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
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Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the judgment of the three-judge district court be affirmed, on the ground that it is manifest that the questions presented by appellants are so unsubstantial as not to require further argument.

OPINIONS BELOW

The opinion of the three-judge district court determining the action to be a proper class action and granting plaintiffs' motion for summary judgment is reported sub nom. Milne v. Berman, 384 F.Supp. 206 (S.D.N.Y. 1974).

QUESTIONS PRESENTED

1. Whether New York Social Services Law, §131(11), which provides that a person who applies for public assistance within 75 days after voluntarily terminating his employment "shall...be deemed to have voluntarily terminated his employment for the purpose of qualifying for...assistance...in the absence of evidence to the contrary supplied by such person", violates the Due Process Clause.

> The three-judge district court unanimously held that the rebuttable presumption created by this statute violated the Due Process Clause. [384 F.Supp. at 210, 213].

2. Whether the presumption contained in New York Social Services Law,§131(11) was in operation irrebuttable in violation of the Due Process Clause, where the hearings offered plaintiffs were not determined until after the expiration of the 75 day statutory period, and thus did not afford plaintiffs an opportunity to rebut the presumption.

> The three-judge district court did not reach this question [384 F.Supp. 209], but noted that the presumption was irrebuttable in operation. [384 F.Supp. at 211 n. 5]. Appellees contend that the judgement below may also be affirmed on this ground.

3. Whether applicants for Aid to Needy Families With Dependent Children assistance were properly included in the plaintiff class.

> The three-judge district court held that they were properly included in the plaintiff class. [384 F.Supp. at 210].

STATUTE INVOLVED

Enforcement of the emphasized portion of the following statute was enjoined by the three-judge district court, [384 F.Supp. at 213]:

> "Any person who voluntarily terminated his employment or voluntarily reduced his earning capacity for the purpose of qualifying for home relief or aid to dependent children or a larger amount thereof shall be disqualified from receiving such assistance for seventy-five days from such termination or reduction, unless otherwise required by federal law or regulation. Any person who applies for home relief or aid to dependent children or requests an increase in his grant within seventy-five days after voluntarily terminating his employment or reducing his earning capacity shall, unless otherwise required by federal law or regulation, be deemed to have voluntarily terminated his employment or reduced his earning capacity for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person." N.Y. Social Services Law, §131(11) (McKinney Supp. 1974) (emphasis added).

PRELIMINARY STATEMENT

New York Social Services Law, §131(11) on its face creates a rebuttable presumption that all persons who apply for public assistance within 75 days after voluntarily terminating their employment, terminated employment for the purpose of qualifying for assistance. Each of the plaintiffs-appellees (hereafter plaintiffs) were denied public assistance pursuant to this provision.*

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* The court below certified the action as a class action. 384 F.Supp. at 213. Defendent does not contest the propriety of the class, but only challenges the inclusion of AFDC recipients in the class. Since the presumption operates for a 75 day period, the nature of the issue is such that it is "capable of repetition, yet evading review." Sosna v. Iowa, 43 U.S.C.W. 4125, 4127-4129 (U.S. Jan. 14, 1975).

In operation, plaintiffs were denied opportunities to rebut the presumption during the 75 day statutory period. The hearings offered them did not have to be determined until 90 days after the hearing was requested, 18 N.Y.C.R.R. §358.18, and thus after the end of the statutory 75 day period.

This case thus involves the relatively narrow question, whether the statutory rebuttable presumption on its face and as applied violates the Due Process Clause. This action does not challenge New York's substantive work requirements for public assistance eligibility. Cf. New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973). Nor does this action challenge New York's substantive policy of denying public assistance to any person who in fact terminates his employment for the purpose of qualifying for public assistance.

Defendant-appellant (hereafter defendant) has not shown that the procedural device of the presumption contained in New York Social Services Law, §131(11) is necessary for the operation of New York's public assistance program, or that other states find it necessary to utilize this or similar presumptions in order to carry out their public assistance programs.

I

THE DECISION BELOW IS CLEARLY CORRECT

Plaintiffs were disqualified from receiving any public assistance due to the enforcement of the statutory presumption that they left their employment in order to qualify for public assistance. The three-judge court held that this presumption violated the Due Process Clause because there is no rational connection between the known fact, i.e., voluntary employment termination within the seventy-five days preceding application for public assistance, and the presumed fact, i.e., that employment termination was for the purpose of qualifying for public assistance.

In reaching this conclusion, the court below applied the standard to determine the constitutionality of a presumption that this Court has consistently applied since the decision in Mobile Jackson and Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910). For a statutory presumption to satisfy the requirements of due process there must be a "rational connection between the fact proved and the ultimate fact presumed... [T]he inference of one fact from another shall not be so unreasonable as to be a purely arbitrary mandate." Mobile Jackson and Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910). Accord, Adler v. Board of Education, 342 U.S.485, 494 (1952); Bandini v. Superior Court, 284 U.S. 8, 11 (1931); Western and Atlantic R.R. v. Henderson, 279 U.S. 639, 642-644 (1929); McFarland v. American Sugar Refining Co., 241 U.S. 79, 86 (1916); Lindsley v. Natural Carbonic Co., 220 U.S. 61, 82-83 (1910). See also,

Turner v. United States, 396 U.S. 398 (1970); Leary v. United States, 395 U.S. 6 (1969); United States v. Romano, 380 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965); Tot v. United States, 319 U.S. 463 (1943); Manley v. Georgia, 279 U.S. 1 (1929).* To determine if this rational connection is present, the three-judge district court followed this Court's approach of relying upon "common sense and experience", Barnes v. United States, 412 U.S. 837, 845 (1973), and "the available pertinent data." Leary v. United States, 395 U.S. 6, 38 (1969). Accord, Turner v. United States, 396 U.S. 398 (1970).

Applying these well established standards the three-judge district court concluded "that the statutory rebuttable presumption is irrational and in violation of the due process clause because there is an insufficient connection between the known fact, that is, application for public assistance within 75 days of an applicant's termination of employment, and the fact presumed by the statute, that is,that the applicant terminated his employment for the purpose of qualifying for public assistance."

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* See also Speiser v. Randall, 357 U.S. 513,523-524 (1958) ("In civil cases too, this court has struck down state statutes unfairly shifting the burden of proof.") The sanction of the denial of assistance for 75 days based on the statutory presumption must comport with the Due Process Clause. See generally, Goldberg v. Kelly, 397 U.S. 254 (1969). It is not constitutionally significant that the enforcement of the presumption was primarily against applicants for the state and locally funded home relief assistance, New York Social Services Law, §158. Constitutional limitations are fully applicable to a state and locally funded program. See, Memorial Hospital v. Maricopa County, 415 U.S. 1050 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973).

Milne v. Berman, 384 F.Supp. 206, 210 (S.D.N.Y. 1974). See Bailey v. Alabama, 219 U.S. 219, 238, where this Court in dictum criticized a similar presumption arising from employment termination. See also, Owens v. Roberts, 377 F.Supp. 45 (M.D. Fla. 1974) (three-judge court).

The court below had ample basis to conclude that there is no rational connection between the given facts and the presumed motive to qualify for assistance:

(1) The amount of public assistance, approximately $3 per day to meet all of a person's needs other than shelter, New York Social Services Law, §131-a(3), is so low that "it cannot be assumed that any substantial number of people would terminate their employment in order to receive assistance." [384 F.Supp. at 210].*

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* Additionally, New York requires liquidation of virtually all of a recipient's assets as a condition of eligibility. See generally, Snell v. Wyman, 281 F.Supp. 853 (S.D.N.Y.), aff'd, 393 U.S. 323 (1969). The former Acting Commissioner of the New York Department of Social Services, defendant Lavine's predecessor, has testified before a congressional subcommittee on fiscal policy: "But I question ... that the public assistance payment levels themselves, or even the combination of services are so liberal as to encourage people to leave work and to go on the public assistance rolls." Testimony of Mr. Barry Van Lare, Problems in Administration of Public Welfare Programs, Hearings before Subcommittee on Fiscal Policy, Joint Economic Committee, 92d Sess. Part I, p.362, March 20, April 11, 12, 13, 1972.

(2) In view of the fact that all public assistance recipients must comply with New York's work rules as conditions of their eligibility, New York Social Services Law, §131( ), "it is not reasonable to presume that currently employed persons would terminate their employment to attempt to avoid work." [384 F.Supp. at 210 n.3].

(3) People generally terminate their employment for reasons totally unrelated to public assistance eligibility - "desire for advancement, problems of health, family problems, transportation problems, personality conflicts, working conditions, and...basic discontent with a job...." [384 F.Supp. at 210]. There are also "numerous reasons why a person who terminates his employment subsequently becomes impoverished and has to resort to a request for public assistance - general economic conditions, a decline in job availability in a particular industry, health,...failure to receive an anticipated new position" and delay in receiving unemployment insurance benefits. [384 F.Supp. at 211].

(4) Government studies and reports submitted to the court below and uncontroverted by defendants clearly substantiate the facts that poor people have the same desire to work and the same work ethic as other persons, and that there is "no significant association whatsoever between public welfare expenditures per capita and [labor force participation of males aged 25-54]."*

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* Bowen, W.G. and Finegan, T.A., The Economics of Labor Force Participation, p.71 (Princeton University Press, (1969) (partially funded by United States Department of Labor Manpower Administration.) Copies of these and numerous other studies substantiating the irrationality of the statutory presumption are annexed to the Affidavit of Norlander in Support of Plaintiffs' Motions for Order Determining Class Action and Summary Judgment.

Each of the above reasons and certainly all in combination substantiate that there is no rational basis to presume that plaintiffs terminated their employment for the purpose of qualifying for public assistance.*

Defendant's contention that New York Social Services Law 131(11) is designed to deter persons from leaving employment in the expectation of obtaining public assistance does not justify the imposition of an irrational presumption. As the court below concluded, convenience does "not justify the presumption operating so as to impute bad motive in all cases." Milne v. Berman, 384 F.Supp. 206, 212 (S.D.N.Y. 1974) (emphasis in original).

Because the three-judge district court correctly concluded that the statutory presumption on its face was irrational in violation of the Due Process Clause, plenary review by this Court is not warranted.

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* The court below also properly rejected the contention that it should uphold the presumption because the motive for terminating employment is within the knowledge of the applicant. Milne v. Berman, 384 F.Supp. 206, 212 (S.D.N.Y. 1974). This court has held that an irrational presumption cannot be sustained on the basis of the comparative convenience of producing evidence. Leary v. United States, 395 U.S. 6, 45 (1965); Tot v. United States, 319 U.S. 463, 467-469 (1943). Presumptions of knowledge were held unconstitutional in Leary and in Turner v. United States, 396 U.S. 398 (1970). See also, New York Times Company v. Sullivan, 376 U.S. 254, 284 (1964), citing Bailey v. Alabama, 219 U.S. 219, 239 (1910). In Bailey, supra, a presumption arising from employment termination was criticized in dictum.

II

THE JUDGMENT BELOW MAY BE AFFIRMED ON THE ALTERNATIVE GROUND THAT PLAINTIFFS WERE DENIED A FAIR OPPORTUNITY TO REBUT THE PRESUMPTION.

In operation, the statutory presumption denied plaintiffs an opportunity to rebut the presumption within the 75 day sanction period and thus operated as a conclusive presumption in violation of the Due Process Clause. A legislative presumption which "operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense ... violates the due process clause." Bandini Petoleum v. Superior Court, 284 U.S. 8, 19 (1931); Western and Atlantic Railroad v. Henderson, 279 U.S. 639, 642 (1929); Mobile, Jackson, and Kansas City Railroad Co. v. Turnipseed, 219 U.S. 35, 43 (1970). Accord, Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); United States Department of Agriculture v. Murray, 413 U.S. 508 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

The only "opportunity" plaintiffs had to rebut the presumption was at State fair hearings. 18 N.Y.C.R.R. Part 358. Defendant, however, has up to 90 days after the hearing is requested to render and implement a fair hearing decision. 18 N.Y.C.R.R. §358.18; 45 C.F.R. §205.10 (a)(16).*

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* Defendant Lavine admits that an expedited hearing does not exist for persons found ineligible for assistance pursuant to the statutory presumption. Jurisdictional Statement, p.25; Defendant Lavine's Answer, ¶¶18-21. Moreover, defendant has not even complied with the 90 day requirement. Nelson v. Sugarman, 361 F.Supp. 1132 (S.D.N.Y. 1971); Cisco v. Lavine, 72 Misc. 2d 1009 and 72 Misc. 2d 1087 (N.Y. Sup.Ct. 1973).

The district court, while not resting its decision on this basis, found that "quite obviously, a determination of whether the statutory presumption has been rebutted is totally meaningless when it occurs after the 75 day waiting period. This Catch-22 approach to procedural due process is evidenced in the record ...." Milne v. Berman, 384 F.Supp. 206, 211 n.5 (S.D.N.Y. 1974). See also, Owens v. Roberts, 377 F.Supp. 45, 52 (M.D. Fla. 1974) (three-judge court).

Defendant contends that the plaintiffs could rebut the presumption at the time they applied for assistance. The record shows otherwise. In addition, at this time, plaintiffs had not received prior notice of the reasons for the denial, did not have an opportunity to retain counsel, had no opportunity to obtain and present their "evidence" [N.Y. Social Services Law, §131(11)] or to refute any agency evidence, and had no opportunity to obtain a decision from an impartial decision maker. All of the minimal due process protections are lacking at the time of application. Goldberg v. Kelly, 397 U.S. 254 (1969).*

In sum, because plaintiffs were denied an opportunity to rebut the statutory presumption during the 75 day period, the presumption operated as a conclusive presumption in violation of the Due Process Clause. This provides an ample alternative basis for this Court to summarily affirm the judgment of the court below.

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* It is generally recognized that presumptions are devices used to shift the burden of coming forward at an adversary hearing. Wigmore, IX Evidence §2490 (3d edition). Compare Adler v. Board of Education, 342 U.S. 485, 495 (1952).

III

APPLICANTS FOR AFDC ASSISTANCE WERE PROPERLY INCLUDED IN THE PLAINTIFF CLASS.

The three-judge court held that applicants for AFDC assistance were properly included in the plaintiff class because, for purposes of determining the constitutionality of the statutory presumption, there is no constitutional significance between applicants for home relief assistance and applicants for AFDC assistance. [384 F.Supp. at 210].

State regulations provide for a 30, as opposed to a 75 day period of disqualification for AFDC recipients. 18 N.Y.C.R.R. §385.7(b). The determination of the rationality of the statutory presumption does not depend, however, on the length of the period of disqualification. Rather, the critical conclusion by the court below was that it is irrational to presume that plaintiffs terminated their employment in order to qualify for public assistance. This conclusion is equally valid whether a person applies for home relief or AFDC assistance.*

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* 18 N.Y.C.R.R. §385.7(c) provides that where there is a conflict between the sanctions in New York State law and in federal Work Incentive Program (WIN) provisions, "the WIN sanction shall be imposed." The judgment below does not interfere with any of the federal WIN provisions. Nor does the judgment below prevent defendant from requiring plaintiffs to accept any available employment. New York Social Services Law, §131(5).

Moreover, defendant Lavine concedes that "few [AFDC recipients] have been sanctioned under the statute." (Defendant Lavine's Memorandum of Law In Opposition to the Order for Contempt and Equitable Relief and In Support of A Motion for A Partial Stay, Dec. 19, 1974, p.7). The inclusion of AFDC recipients in the plaintiff class thus does not present a substantial question worthy of plenary review by this Court.

CONCLUSION

Wherefore, appellees respectfully submit that the questions upon which this case depends are so unsubstantial as not to need further argument, and appellees respectfully move to affirm the judgment and order of the three-judge district court.

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White Plains, New York

Respectfully submitted,

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